

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

RONALD MEZA,

No. 2:20-cv-2316 JAM KJN P

Petitioner,

v.

MICHAEL PALLARES,

FINDINGS AND RECOMMENDATIONS

Respondent.

Petitioner, a state prisoner, proceeds pro se with an application for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed a motion to dismiss this action alleging the petition was filed beyond the one-year statute of limitations. Petitioner filed an opposition; respondent did not file a reply. As set forth below, the undersigned recommends that the motion be granted.

I. Motion to Dismiss

A. Standards Governing Motion to Dismiss

Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court. . . .” Id. The Court of Appeals for the Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the court to dismiss under Rule 4 of the Rules Governing § 2254 Cases. See, e.g., O’Bremski v. Maass, 915 F.2d 418, 420

1 (1991). Accordingly, the court reviews respondent's motion to dismiss pursuant to its authority  
2 under Rule 4.

3 **II. Statute of Limitations**

4 **A. Legal Standards**

5 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became  
6 law on April 24, 1996, imposed for the first time a statute of limitations on petitions for a writ of  
7 habeas corpus filed by state prisoners. This statute of limitations provides that:

8 A 1-year period of limitation shall apply to an application for a writ  
9 of habeas corpus by a person in custody, pursuant to the judgment of  
a State court. The limitation period shall run from the latest of –

10 (A) the date on which the judgment became final by the conclusion  
11 of direct review or the expiration of the time for seeking such review;

12 (B) the date on which the impediment to filing an application created  
13 by State action in violation of the Constitution or laws of the United  
States is removed, if the applicant was prevented from filing by such  
State action;

14 (C) the date on which the constitutional right asserted was initially  
15 recognized by the Supreme Court, if the right has been newly  
recognized by the Supreme Court and made retroactively applicable  
to cases on collateral review; or

16 (D) the date on which the factual predicate of the claim or claims  
17 presented could have been discovered through the exercise of due  
diligence.

19 28 U.S.C. § 2244 (d)(1).<sup>1</sup>

20 **B. Chronology**

21 For purposes of the statute of limitations analysis, the relevant chronology of this case is  
22 as follows:

23 1. Petitioner was convicted in the Sacramento County Superior Court of false  
24 imprisonment and various sex offenses against a child, and was sentenced on April 8, 2011, to an  
25 indeterminate state prison term of 42 years-to-life. (ECF No. 10-1.)

26 ////

27 

---

28 <sup>1</sup> As set forth above, the limitations period may begin running later under certain specified  
circumstances, 28 U.S.C. § 2244(d)(1)(B), (C), & (D); none of these circumstances apply here.

1           2. Petitioner filed an appeal. On July 19, 2012, the California Court of Appeal for the  
2 Third Appellate District reduced the felony false imprisonment conviction to misdemeanor false  
3 imprisonment and remanded for resentencing, but otherwise affirmed the judgment. (ECF No.  
4 10-2 at 2.)

5           3. Petitioner sought review in the California Supreme Court, which was denied on  
6 September 26, 2012. (ECF Nos. 10-3, 10-4.)

7           4. On November 14, 2012, petitioner was resentenced. The Sacramento County Superior  
8 Court noted that petitioner's April 8, 2011 sentence remained as imposed with the following  
9 exceptions: the false imprisonment conviction was deemed a misdemeanor, the prior felony false  
10 imprisonment conviction was vacated, and petitioner was sentenced to one year for misdemeanor  
11 false imprisonment, and such sentence was stayed. (ECF No. 10-5.)

12          5. Petitioner did not appeal the new sentence.

13          6. Following his resentencing, petitioner did not file any post-conviction collateral actions  
14 in state court.

15          7. On November 5, 2020, petitioner constructively filed the instant federal petition. See  
16 Rule 3(d) of the Federal Rules Governing Section 2254 Cases.

17          C. Calculation of Limitations Period

18          For purposes of calculating the limitations period in this case, § 2244(d)(1)(A) applies.  
19 Petitioner was resentenced on November 14, 2012. Because petitioner did not file an appeal, the  
20 judgment became final on January 14, 2013.<sup>2</sup> Cal. R. Ct. 8.38(a); Stancle v. Clay, 692 F.3d 948,  
21 951 (9th Cir. 2012). The limitations period began the next day, January 15, 2013. Patterson v.  
22 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001) (the AEDPA limitations period begins to run on the  
23 day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Thus, the one-year limitation  
24 period commenced on January 15, 2013, and, absent tolling, expired on January 15, 2014.

25 \_\_\_\_\_  
26 <sup>2</sup> Sixty days after the resentencing was January 13, 2013, which fell on a Sunday. Accordingly,  
27 the time for seeking review was extended to the next business day. See Cal. R. Ct. 1.10(a) ("The  
28 time in which any act provided by these rules is to be performed is computed by excluding the  
first day and including the last, unless the last day is a Saturday, Sunday, or other legal holiday,  
and then it is also excluded.").

1           D. Statutory Tolling

2           Section 2244(d)(2) provides that “the time during which a properly filed application for  
3 State post-conviction or other collateral review with respect to the pertinent judgment or claim is  
4 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2). A properly  
5 filed application is one that complies with the applicable laws and rules governing filings,  
6 including the form of the application and time limitations. Artuz v. Bennett, 531 U.S. 4, 8 (2000).

7           State habeas petitions filed after the one-year statute of limitations expired do not revive  
8 the statute of limitations and have no tolling effect. Ferguson v. Palmateer, 321 F.3d 820, 823  
9 (9th Cir. 2003) (“section 2244(d) does not permit the reinitiation of the limitations period that has  
10 ended before the state petition was filed”); Jiminez v. Rice, 276 F.3d 478, 482 (9th Cir. 2001).

11          Here, petitioner filed no state post-conviction collateral actions before the limitations  
12 period expired, and therefore is not entitled to any statutory tolling. Rather, the federal  
13 limitations period expired on January 15, 2014. Petitioner did not file the instant petition until  
14 November 5, 2020, exceeding the limitations period by over six years and nine months. Thus,  
15 absent equitable tolling, this action is time-barred.

16 III. Equitable Tolling

17          Petitioner does not claim his petition was timely, but rather seeks equitable tolling.

18           A. Petitioner’s Arguments - Petition

19          Petitioner argues he is entitled to equitable tolling because of the following circumstances  
20 he claims are extraordinary and beyond his control:

21           1. Petitioner is only semi-literate, with a 6.2 reading TABE score (sixth grade reading  
22 level). (ECF No. 1 at 20.)

23           2. Petitioner had difficulty maintaining his legal materials: (a) prison officials lost  
24 petitioner’s legal materials when he was transferred out to court in 2013; petitioner did not know  
25 about the deadline until appellate counsel advised him of the deadline after the deadline had  
26 passed; (b) following an assault by a cellmate due to petitioner’s sex offender status, petitioner’s  
27 legal materials were distributed to other inmates on the tier and lost a second time (no dates  
28 ////

1 provided); (c) finally, in August 2020, petitioner secured a third set of his legal materials, after  
2 diligently attempting to obtain them earlier. (ECF No. 1 at 20.)

3       3. While petitioner had his legal paperwork in his cell, he feared for his life due to his sex  
4 offender conviction; his sex offender status interfered with his ability to obtain inmate assistance  
5 and to access the law library due to sex offender animosity and potential violence. (ECF No. 1 at  
6 21-22.)

7       4. Petitioner suffered restrictions due to COVID-19, confined in the modified program  
8 since February 2020, with no law library access, just walk-up copies and legal supplies. (ECF  
9 No. 1 at 22-23.)

10       Petitioner further contends that he is entitled to an evidentiary hearing to determine  
11 whether extraordinary circumstances warrant equitable tolling “due to potential for violence or  
12 death from inmates who harbor deep resentment toward sex offenders.” (ECF No. 1 at 15, 23.)<sup>3</sup>

13       Petitioner provided his own declaration, as well as the declaration of inmate Stan Solvey  
14 who assisted petitioner in filing this action. (ECF No. 1 at 32-38.)

15       B. Respondent's Arguments

16       Respondent counters that the circumstances described by petitioner are not extraordinary  
17 and were not the cause of his untimeliness. (ECF No. 9 at 3.) First, the assessment of petitioner’s  
18 reading ability in 2016 does not prove that his reading level is an extraordinary circumstance that  
19 prevented him from timely filing his federal petition for over six years. (ECF No. 9 at 4.) In  
20 addition, respondent points out that the well-written federal petition and declaration show  
21 petitioner has sufficient reading and writing skills; the record reflects petitioner wrote his attorney  
22 numerous times about the appellate record (ECF No. 1 at 20), wrote the clerk of court (ECF No. 1  
23 at 48), and submitted written requests to prison officials for the return of his paperwork and legal  
24 documents (ECF No. 1 at 52-61).

25       ////

26

---

27       <sup>3</sup> Petitioner also stated that if he is granted equitable tolling, he will “only raise 1 of the 4  
28 exhausted claims, the Miranda violation.” (ECF No. 1 at 19.) However, the petition that was  
      filed only raises one claim -- the Miranda violation.

1           Second, petitioner did not provide the date he obtained the first replacement documents,  
2 but it appears the documents were likely sent to petitioner again on January 15, 2013, just two  
3 days after the limitations period began. (ECF No. 9 at 6, citing ECF No. 1 at 42-45.) Appellate  
4 counsel advised petitioner to tell the court about the missing documents. (ECF No. 1 at 45.)  
5 Nevertheless, that petitioner may have been without his legal materials for a short period at the  
6 beginning of the limitations period does not rise to the level of an extraordinary circumstance  
7 warranting equitable tolling. In addition, petitioner's sole claim in his federal petition is that his  
8 conviction was obtained in violation of the privilege against self-incrimination, the same claim he  
9 raised on direct appeal. Thus, once he received his legal materials, petitioner failed to explain the  
10 over six-year delay in bringing that same claim. Petitioner fails to show he was diligent  
11 throughout the limitation period. Smith v. Davis, 953 f.3d 582 (9th Cir. 2020).

12           Third, petitioner's difficulties in obtaining inmate assistance due to the sensitive nature of  
13 his crimes are unavailing in light of multiple authorities to the contrary. (ECF No. 9 at 5.)

14           Finally, petitioner's reliance on COVID-19 restrictions is unavailing because state  
15 restrictions due to COVID-19 did not occur until March of 2020, over six years after the  
16 limitation period expired on January 13, 2014.

17           C. Petitioner's Opposition to Motion to Dismiss

18           In his supporting declaration, petitioner claims that the documents provided with his  
19 opposition will demonstrate the delay he sustained in accessing his legal property. Petitioner  
20 reiterates that he has no education skills to evaluate the law, and seeks an evidentiary hearing to  
21 hear from CCI Webb (ad seg counselor) as to petitioner's unanswered requests for his property;  
22 CCI Gonzalez (building counselor) as to the unanswered letters and requests; Edwin Valencia  
23 (inmate at Pleasant Valley State Prison ("PVSP")) as to the disposition of the federal habeas  
24 corpus petition Mr. Valencia completed for petitioner and the appellate record and the dates  
25 involved; and the appellate attorneys as to why they did not respond to petitioner's request for a  
26 third set of replacement legal documents. (ECF No. 19 at 1-2.)

27           In an attached handwritten document, petitioner reiterates that his conviction causes him  
28 constant fear for his safety while in prison, and his low grade level makes him incompetent to

1 pursue his habeas claims. (ECF No. 19 at 24-25.) Petitioner returned from being out to court for  
2 resentencing on November 18, 2012, but did not receive his stored property at that time. (ECF  
3 No. 19 at 26.) Despite repeated requests, petitioner's property was not returned. Petitioner sent  
4 another request on February 7, 2013. (ECF No. 19 at 29.)

5 Meanwhile, petitioner found an inmate (Edwin Valencia) who would help prepare the  
6 federal habeas petition. But on February 20, 2013, petitioner was placed in ad seg and his  
7 property was then packed. Mr. Valencia called petitioner's aunt, who wrote petitioner to tell him  
8 Mr. Valencia would still work on the petition, but they had to do so by writing to and from  
9 petitioner's aunt. Petitioner continued requesting his legal property, but never received a  
10 response. (ECF No. 19 at 30.) Mr. Valencia wrote again, informing petitioner that Mr. Valencia  
11 finished the habeas petition and dropped petitioner's legal work off in a yard at 2 Building  
12 Counselor (Mr. Gonzales). Petitioner would have to write another request to Mr. Gonzales to  
13 have the materials delivered to ASU Counselor Webb so petitioner could get the papers as soon  
14 as possible and file the habeas petition. (ECF No. 19 at 31-32.)

15 In addition, in response to attorney Kotler's letter, petitioner wrote the federal defender for  
16 assistance, but the federal defender responded that their office could not assist unless appointed  
17 petitioner's counsel. (ECF No. 19 at 33-34.)

18 "Almost eight months went by." (ECF No. 19 at 34.) Mr. Webb "came to the door and  
19 appointed me to meet with committee." (Id.) Petitioner saw the committee, and after he was sent  
20 to D yard, petitioner finally received his property, but papers were missing. (ECF No. 19 at 34.)  
21 When petitioner was transferred from PVSP, petitioner asked for his legal documents to be sent to  
22 his aunt so petitioner's case could be looked over by a criminal lawyer "before the deadline  
23 ended." (ECF No. 19 at 35.) However, the documents never arrived at his aunt's home. (ECF  
24 No. 19 at 35, 37.)

25 When petitioner arrived at Kern Valley State Prison ("KVSP"), he had no legal property.  
26 Eventually, petitioner saw a notice on the dayroom wall that inmate Stan Solvery was a legal  
27 worker. (ECF No. 19 at 39.) Time passed, and petitioner told his sister about Solvery, and  
28 petitioner's sister encouraged petitioner to talk with Solvery. (ECF No. 19 at 40-41.) Initially,

1 Solvery wanted to look into the case before deciding whether to help petitioner. Solvery  
2 explained equitable tolling, and that it would be a problem of how many years had passed since  
3 the deadline expired. (ECF No. 19 at 41.) Petitioner saw his request forms for the return of his  
4 legal property as extraordinary circumstances, and was “being oppressed by the court’s thinking  
5 that [he] knew law.” (ECF No. 19 at 42.) Petitioner contends his request forms demonstrate that  
6 PVSP staff withheld petitioner’s legal property the entire time petitioner went out to court on  
7 November 13, 2012; then after February 20, 2013, to November 7, 2013, while petitioner was in  
8 ad seg. (ECF No. 19 at 43.) He contends his legal property was unlawfully held in storage for  
9 “approximately 1 year.” (ECF No. 19 at 46.)

10       D. Petitioner’s Exhibits

11       Petitioner’s exhibits (petition and opposition) are listed in chronological order below:

12           August 22, 2012 letter to petitioner at PVSP from appellate counsel Kotler providing a  
13 copy of the petition for review she was mailing to the California Supreme Court that day;  
14 advising petitioner that any federal petition must be filed within one year and 90 days from the  
15 ruling on the petition for review; and providing the address of the U.S. District Court. (ECF No.  
16 1 at 42-43.)

17           October 26, 2012 letter from attorney Kotler sending petitioner another copy of the  
18 petition for review, the order of the CA Supreme Court denying review (September 26, 2012),  
19 opinion of the Court of Appeal, and her August 22, 2012 letter re deadlines. (ECF No. 1 at 44.)  
20 Ms. Kotler warned petitioner she could not continue to send duplicate copies.

21 **2013**

22           First page of January **15**, 2013 letter from Balin & Kotler, stating they received  
23 petitioner’s January 6, 2013 letter, and advising that petitioner had now missed the deadline for  
24 filing his federal habeas petition and suggesting that petitioner “attempt to file the habeas petition  
25 and ask the federal district court for equitable tolling of the deadline.”<sup>4</sup> (ECF No. 1 at 45; 19 at  
26 20.) Counsel would also contact the federal public defender, explain what took place, and see

27           

---

28 <sup>4</sup> Petitioner did not provide a copy of any additional pages or the signature page for a letter dated  
January **15**, 2013. (*Id.*)

1 whether they would assist petitioner. If they would not, counsel provided the standards for  
2 equitable tolling, and recommended petitioner include such argument in his federal petition, along  
3 with a declaration explaining what petitioner told counsel. (Id.) Counsel noted they were  
4 returning to petitioner his inmate request to include with his habeas petition. (Id.)

5 Page two of a January **16**, 2013 letter from attorney Eileen S. Kotler: “I hope you move  
6 quickly to get this resolved because the federal district court will consider the efforts you made to  
7 take care of this problem.” (ECF No. 19 at 5.)

8 On January 21, 2013, while petitioner was housed at PVSP A2-101, petitioner submitted a  
9 CDCR 22 form stating it had been two months since petitioner returned from out to court when  
10 all of his legal property was put into storage by Building 2 staff, and now Building 2 staff claimed  
11 R&R had petitioner’s stored property and R&R claims Building 2 had the stored property. (ECF  
12 No. 1 at 53; 19 at 16.) Petitioner wrote that he had legal filing deadlines and had submitted more  
13 than several requests for release of his property and the non-delivery was interfering with such  
14 filings. (Id.) On January 21, 2013, staff member J. Andrade forwarded the request to Building 2  
15 staff, but no further response is on the form. (Id.)

16 On February 5, 2013, still housed in A2-101, petitioner submitted a CDCR 22 writing that  
17 it had been three months since he returned from court and still had not received his legal papers  
18 back from storage, and asked to check into this matter, noting “Need immediately!” (ECF No. 1  
19 at 54; ECF No. 19 at 17.) Staff noted the CDCR 22 form was received and forwarded to CCI on  
20 February 6, 2013. (Id.) No further staff response is noted.

21 On February 7, 2013, still housed in A2-101, petitioner submitted a CDCR 22 again  
22 noting his legal deadline and requesting the release of his legal property for appeal deadline; staff  
23 received the form and forwarded it to R&R supervisory staff on February 7, 2013. (ECF No. 1 at  
24 55; ECF No. 19 at 18.) No further staff response is noted.

25 February 20, 2013 rules violation report, resulting in petitioner’s placement in the  
26 administrative segregation unit (“ad seg” or “ASU”). (ECF No. 19 at 7-8.)

27 ////

28 ////

1 An inmate property inventory receipt dated February 20, 2013, for property stored due to  
2 petitioner's placement in ad seg.<sup>5</sup> (ECF No. 19 at 22.)

3 First page of a March 28, 2013 letter from federal defender (responding to petitioner's  
4 "recent letter") advising petitioner that the federal defender cannot represent individuals unless  
5 appointed by a federal court. (ECF No. 1 at 51.) Advised petitioner that he can file a motion for  
6 appointment of counsel with his federal petition, or any time after he filed his federal petition, and  
7 provided petitioner with three forms, including a petition for writ of habeas corpus. (Id.)

8 On August 7, 2013, while housed in ad seg (ASU 8-177), petitioner signed a CDCR form  
9 asking Counselor Webb whether anyone dropped off legal papers for petitioner at A yard. (ECF  
10 No. 1 at 58; 19 at 10.) No staff delivery or response is noted, although "(Counselor) Staff Webb"  
11 is handwritten in the "if forwarded to" box. (Id.)

12 Petitioner provided another CDCR 22 form while housed in ASU C-129, but both the date  
13 and text are illegible. (ECF No. 1 at 59; 19 at 13.) No staff delivery or response is noted. (Id.)

14 On September 29, 2013, while housed in ASU/C-129, petitioner completed a CDCR 22  
15 form noting petitioner would be transferred to Kern Valley State Prison and asked Counselor  
16 Gonzalez to have petitioner's legal documents and transcripts sent there or, if Gonzalez had the  
17 legal materials "right now" have them sent as soon as possible. (ECF No. 1 at 56, 60; ECF No.  
18 19 at 11, 14.) Staff Counselor Webb responded on September 30, 2013: "Your paperwork was  
19 placed in your ASU property on 9/27/13." (Id.)

20 On September 29, 2013, petitioner completed a CDCR 22 form directed to Counselor  
21 Gonzalez, stating petitioner had left his original documents and transcripts for inmate Valencia,  
22 who was supposed to help finish the habeas petition, and inquired whether Gonzalez had the  
23 documents. Although the delivery box appears marked, there is no staff signature or date. (ECF  
24 No. 1 at 61; 19 at 12.) "A Yard Staff Counselor Gonzalez" is handwritten in the "if forwarded" to  
25 box, but there is no date or method marked. (Id.)

26  
27 <sup>5</sup> The cover page claims "Bed Assignments of Ronald Meza from 8-29-12 to 12-10-14 indicating  
28 when he was in ad seg and transferred," but the only document appended was the property  
receipt. (ECF No. 19 at 21-22.)

1       **2019**

2                  An August 22, 2019 second level appeal response noting he had a reading grade point  
3                  level above 4.0. (ECF No. 19 at 4.)

4       **2020**

5                  Rehabilitative Case Plan, dated April 8, 2020, reflecting TABE reading score 6.2; math  
6                  7.1. (ECF No. 1 at 39.) No high school diploma or GED. (Id.)

7                  July 29, 2020 letter from attorney William Balin, forwarding to petitioner “briefs from  
8                  computer files” of Ms. Kotler, now retired and inactive. (ECF No. 1 at 46.) Mr. Balin noted that  
9                  in 2012, Ms. Kotler advised petitioner to first file a petition for a writ of habeas corpus and then,  
10                 as part of that petition, to ask the court to appoint an attorney to assist in any further habeas  
11                 proceedings. (ECF No. 1 at 46.) Mr. Balin noted that petitioner first asked the federal defender  
12                 to assist petitioner before petitioner filed his petition, but Balin informed petitioner that he must  
13                 first file the petition, and ask the court to appoint the federal defender. (ECF No. 1 at 47.) Mr.  
14                 Balin reminded petitioner that there are strict time deadlines for filing a federal habeas petition,  
15                 and because his appeal ended in 2012, counsel suspected that the deadline had expired. (ECF No.  
16                 1 at 47.) Mr. Balin recommended that petitioner seek the advice of a different attorney to see if  
17                 the deadline could be extended, or if petitioner could establish factual innocence. (ECF No. 1 at  
18                 47.)

19                  On October 19, 2020, petitioner wrote a letter to the U.S. District Court, E.D. Cal. (Fresno  
20                 Div.) seeking forms for filing a habeas petition and a request to proceed in forma pauperis. (ECF  
21                 No. 1 at 48.)

22                  E. Governing Standards

23                  A habeas petitioner is entitled to equitable tolling of the one-year statute of limitations  
24                 only if the petitioner shows: ““(1) that he has been pursuing his rights diligently, and (2) that  
25                 some extraordinary circumstance stood in his way’ and prevented timely filing.” Holland v.  
26                 Florida, 560 U.S. 631, 649 (2010) (quoting Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005)). A  
27                 petitioner must have “been reasonably diligent in pursuing his rights not only while an  
28                 impediment to filing caused by an extraordinary circumstance existed, but before and after as

1 well, up to the time of filing his claim in federal court.” Smith v. Davis, 953 F.3d 582, 599 (9th  
 2 Cir.), cert. denied, 141 S. Ct. 878 (2020). In other words, “[w]hen external forces, rather than a  
 3 petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the  
 4 statute of limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)  
 5 (citations omitted). “The diligence required for equitable tolling purposes is ‘reasonable  
 6 diligence,’ not ‘maximum feasible diligence.’” Holland, 560 U.S. at 653 (internal citations and  
 7 some quotation marks omitted).

8 Extraordinary circumstances need not be an “*actual* impossibility; rather, equitable tolling  
 9 is appropriate where ‘it would have technically been possible for a prisoner to file a petition, but a  
 10 prisoner would have likely been unable to do so.’” Grant v. Swarthout, 862 F.3d 914, 918 (9th  
 11 Cir. 2017) (quoting Gibbs v. Legrand, 767 F.3d 879, 888 (9th Cir. 2014)). That said, equitable  
 12 tolling should be applied sparingly. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008, 1011 (9th  
 13 Cir. 2009) (“To apply the doctrine in ‘extraordinary circumstances’ necessarily suggests the  
 14 doctrine’s rarity. . . .”). Petitioner must “show that that the ‘extraordinary circumstances’ were  
 15 the cause of his untimeliness.” Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003) (quoting  
 16 Stillman v. LaMarque, 319 F.3d 1199, 1203 (9th Cir. 2003) (“petitioner entitled to equitable  
 17 tolling ‘since prison officials’ misconduct proximately caused the late filing.”)) “[I]t is only when  
 18 an extraordinary circumstance prevented a petitioner acting with reasonable diligence from  
 19 making a timely filing that equitable tolling may be the proper remedy.” Davis, 953 F.3d at 600;  
 20 see also Menominee Indian Tribe of Wis. v. United States, 577 U.S. 250, 257 (2016) (Such  
 21 circumstance must be “both extraordinary *and* beyond [the petitioner’s] control.”).

22 Petitioner bears the burden of alleging facts that would give rise to tolling. Pace, 544 U.S.  
 23 at 418; Espinosa-Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005). “A habeas  
 24 petitioner . . . should receive an evidentiary hearing when he makes ‘a good-faith *allegation that*  
 25 *would, if true*, entitle him to equitable tolling.’” Roy v. Lampert, 465 F.3d 964, 969 (9th Cir.  
 26 2006) (emphasis added in Roy) (quoting Laws v. Lamarque, 351 F.3d 919, 921 (9th Cir. 2003)).

27 ////

28 ////

1           F. Discussion

2           The undersigned finds that petitioner failed to meet his burden, for the following reasons.

3           1. Access to Legal Materials

4           Petitioner contends he had difficulty maintaining his legal materials at different times: (a)  
5 prison officials lost his legal paperwork while he was transferred out to court, and withheld while  
6 housed in ad seg; (b) when petitioner transferred from PVSP (on an unidentified date),  
7 petitioner's legal materials were mailed to his aunt, but never arrived; (c) subsequently, on  
8 another unidentified date when petitioner was assaulted, petitioner's legal materials were  
9 distributed to other inmates on the tier and lost a second time; (d) in August 2020, petitioner  
10 secured a third set of his legal materials, after diligently attempting to obtain them earlier.

11           a. 2012-2013

12           Petitioner was resentenced on November 14, 2012, and returned from court to PVSP on  
13 November 18, 2012, prior to the beginning of the federal limitations period. Petitioner does not  
14 make clear on what date he first received his legal materials, but at some point he received his  
15 legal materials because while he was awaiting their return, he found an inmate (Edwin Valencia)  
16 to help petitioner organize the habeas corpus writ. Indeed, petitioner acknowledges that he  
17 received a letter from Mr. Valencia who had finished the habeas writ and dropped it off in A Yard  
18 to Counselor Gonzalez. (ECF No. 19 at 31.) Petitioner's CDCR 22 form confirms that on  
19 September 29, 2013, petitioner sought return of the "legal materials and transcripts" that Mr.  
20 Valencia had dropped off. (ECF No. 19 at 14.) Staff responded that the materials were placed in  
21 petitioner's ad seg property on September 27, 2013. ECF No. 1 at 56, 60; ECF No. 19 at 11, 14.)

22           The limitations period began to run on January 15, 2013. It appears petitioner did not  
23 have his property on February 7, 2013, because he wrote a CDCR 22 seeking its return, and the  
24 request was routed by prison staff. On February 20, 2013, petitioner was placed in ad seg, and  
25 petitioner maintains that he was deprived of his legal property while he was in ad seg. In his  
26 opposition, petitioner clarified that he was housed in ad seg from February 20, 2013, to  
27 November 7, 2013 (ECF No. 19 at 43), just over eight and a half months. Petitioner received his  
28 property after his release from ad seg and transfer to D yard, but "papers came up missing 28

1 U.S.C. § 2254.” (ECF No. 19 at 35-36.) Petitioner did not provide the date he transferred away  
2 from PVSP.

3 It appears petitioner had his legal materials at some point early in the limitations period,  
4 after his return from court, and before he was put in ad seg, because he was able to provide Mr.  
5 Valencia with transcripts referenced in petitioner’s CDCR 22 form. Petitioner also had some of  
6 his legal property after his release from ad seg, prior to his transfer to KVSP.

7 Petitioner’s failure to provide specific dates makes it difficult to calculate the time  
8 remaining on the limitations clock. Moreover, the involvement of Edwin Valencia in preparing  
9 petitioner’s writ calls into question petitioner’s claim that his legal materials were withheld or lost  
10 by prison officials. In addition, it appears petitioner wrote to the federal defender while housed in  
11 ad seg. On the other hand, the failure of prison officials to respond to any of petitioner’s CDCR  
12 22 forms is equally concerning. But, as explained below, no evidentiary hearing concerning such  
13 matters is required because even if petitioner was deprived of his legal materials while he was  
14 housed in ad seg, the record fails to demonstrate petitioner was diligent once he was released  
15 from ad seg. “[I]t is not enough for a petitioner seeking an exercise of equitable tolling to attempt  
16 diligently to remedy his extraordinary circumstances; when free from the extraordinary  
17 circumstance, he must also be diligent in actively pursuing his rights.” Davis, 953 F.3d at 599.  
18 Despite his release from ad seg on November 7, 2013, petitioner fails to set forth what efforts he  
19 made after such release to file his federal petition. At that time, petitioner still had until January  
20 15, 2014, in which to file the federal petition.

21 Moreover, despite appellate counsel’s early notice about the statute of limitations  
22 deadline, of which petitioner concedes he was aware (ECF No. 11 at 33), and then subsequent  
23 advice that petitioner file a federal habeas petition, and act quickly, petitioner instead chose to  
24 contact the federal defender. Then, once petitioner was to be transferred, rather than file a federal  
25 habeas petition (having been twice warned about the limitations period), petitioner opted to mail  
26 his legal materials to his aunt purportedly so that a lawyer could review the documents. Petitioner  
27 could have had the legal materials forwarded to KVSP so that he could then file his federal  
28 petition. Such choices fail to demonstrate reasonable diligence.

1           Thus, even assuming the court found that the deprivation of legal materials during  
 2 petitioner's housing in ad seg constituted an extraordinary circumstance, and that his multiple  
 3 CDCR 22 forms demonstrated his diligence during such period, and granted equitable tolling for  
 4 an entire year, such tolling is insufficient because petitioner did not file his federal petition until  
 5 November 5, 2020. Such lengthy delay fails to meet the required diligence prong.

6           b. No Demonstrated Diligence Following Release from Ad Seg

7           Petitioner also contends that he was assaulted and he lost his legal materials a second  
 8 time. But he does not indicate when or where such assault occurred, or when the documents were  
 9 lost. Moreover, he claims that, after diligently attempting to obtain them earlier, he did not secure  
 10 a third set of his legal materials until sometime in August 2020, but he provided no facts or  
 11 evidence to demonstrate his diligence since his release from ad seg at PVSP or following his  
 12 transfer to KVSP. Indeed, petitioner fails to specifically demonstrate he was diligent from 2014  
 13 to February 2, 2020, when he wrote appellate counsel. He claims appellate counsel delayed  
 14 sending petitioner the additional materials, but provided no copies of letters sent or received in  
 15 connection with any request prior to February 2, 2020. Rather, he provided a letter dated July 29,  
 16 2020, responding to petitioner's letter of February 2, 2020, and such letter made no mention of  
 17 any prior request. (ECF No. 1 at 46.) Such vague and conclusory allegations are insufficient to  
 18 demonstrate petitioner's diligence following his release from ad seg at PVSP.

19           Petitioner's additional contentions about not having his legal materials following his  
 20 transfer to KVSP are also unavailing. Unless a petitioner is raising a sufficiency of the evidence  
 21 claim, which petitioner is not, "petitioners are not required by 28 U.S.C. § 2254 or the Rules  
 22 Governing § 2254 Cases to attach to their petitions, or to file separately, state-court records."  
 23 Pliler v. Ford, 542 U.S. 225, 232 (2004). Petitioner's sole claim was that his Miranda rights were  
 24 violated when he was placed in the patrol car. Aside from his personal knowledge of the facts  
 25 surrounding such claim, this was the same claim petitioner pursued on direct appeal. (ECF No.  
 26 10-4.) Petitioner fails to explain why he could not present such claim when he had possession of  
 27 his legal materials, or after his transfer to KVSP.

28           ////

1                   2. Sensitive Nature of Underlying Conviction

2                   Petitioner strenuously argues that his conviction and sex offender status entitle him to  
 3 equitable tolling due to the risk of physical harm, including death, if other inmates discover such  
 4 information. He contends that the “inmate population’s animosity to sex offenders is a unique  
 5 issue not published in precedent, and is a prevailing problem” in state prisons. (ECF No. 1 at 18.)  
 6 He argues that this is a “unique extraordinary circumstance that is the ultimate hardship as it  
 7 deflates a petitioner’s diligence in preparing and timely filing” a petition. (ECF No. 1 at 22.)

8                   Respondent contends that petitioner’s difficulties in obtaining inmate assistance due to the  
 9 sensitive nature of his crimes are unavailing in light of multiple authorities to the contrary. (ECF  
 10 No. 9 at 5) (citing multiple district court cases).

11                  Petitioner is correct that there are no published cases addressing petitioner’s argument.  
 12 However, one unpublished Ninth Circuit case rejected the prisoner’s claim that he was entitled to  
 13 equitable tolling because “he feared accessing materials from the prison’s library because of his  
 14 status as a sex offender.” Bunyard v. Knowles, 119 F. App’x 172 (9th Cir. 2005) (finding  
 15 Bunyard “failed to identify any specific threats he faced that prevented him from using the law  
 16 library in the prison.”) District courts, including this one, have found that a prisoner’s “status as a  
 17 sex offender, and in turn his fear of other prisoners due to that status, is not an extraordinary  
 18 circumstance that justifies equitable tolling.” Mendoza v. Pollard, 2021 WL 2588155, at \*6 (S.D.  
 19 Cal. June 24, 2021) (collecting cases). Another district court noted that there is no exception for  
 20 sex offenders in 28 U.S.C. § 2244, and that the prisoner’s “decision to remain silent about his  
 21 case demonstrates a lack of diligence and precludes a finding of diligence.” Zavala v. Diaz, 2013  
 22 WL 440638, at \*3 (C.D. Cal. Jan. 25, 2013) (citations omitted).

23                  Here, as in Bunyard, petitioner articulated no specific threats based on his sex offender  
 24 status; rather, he identifies fear based on the inmate population’s animosity to sex offenders.  
 25 Petitioner seeks equitable tolling based solely on his underlying conviction and sex offender  
 26 status. The undersigned is persuaded that the nature of petitioner’s underlying conviction does  
 27 not constitute an extraordinary circumstance warranting the application of equitable tolling.  
 28 Mendoza, 2021 WL 2588155, at \*6.

1                   3. Lack of Inmate Assistance or Law Library Access

2                   Petitioner contends that while he had his legal paperwork in his cell, his sex offender  
 3 status interfered with his ability to obtain inmate assistance and to access the law library due to  
 4 sex offender animosity and potential violence. But petitioner is not entitled to equitable tolling  
 5 merely because he needed to rely on the assistance of another inmate. Chaffer v. Prosper, 592  
 6 F.3d 1046, 1049 (9th Cir. 2010) (finding petitioner's pro se status and reliance on inmate helpers  
 7 not to be extraordinary circumstances justifying equitable tolling); Martinez v. Ryan, 133 F.  
 8 App'x 382, 382-83 (9th Cir. 2005) (limited education, reliance on other prisoners to file petition,  
 9 and lack of access to legal materials and assistance due to custody status do not constitute  
 10 extraordinary circumstances); De Adams v. Hedgpeth, 2015 WL 114163, at \*5 (C.D. Cal. Jan. 7,  
 11 2015) ("as a matter of law, petitioner's need to rely on [a fellow inmate] does not constitute an  
 12 extraordinary circumstance for purposes of equitable tolling"). Petitioner's circumstances are  
 13 similar to those of the majority of incarcerated prisoners attempting to file habeas petitions. His  
 14 inability to access inmate assistance or the law library is not an extraordinary circumstance  
 15 preventing petitioner from preparing a pro se habeas petition.

16                  4. Limited Education/Ignorance of the Law

17                  Petitioner contends he is entitled to equitable tolling because he is only semi-literate, with  
 18 a 6.2 reading TABE score (sixth grade reading level). Such claim is also unavailing. See Baker  
 19 v. Cal. Dep't of Corr., 484 F. App'x 130, 131 (9th Cir. 2012) ("Low literacy levels, lack of legal  
 20 knowledge, and need for some assistance to prepare a habeas petition are not extraordinary  
 21 circumstances to warrant equitable tolling of an untimely habeas petition."); Payne v. Valenzuela,  
 22 2016 WL 304294, at \*1 (C.D. Cal. Jan. 25, 2016) (finding prisoner's lack of legal sophistication  
 23 and limited ability to read and write are not extraordinary circumstances for equitable tolling.).  
 24 Even an inmate's illiteracy is insufficient. Beltran v. Foulk, 2015 WL 1268322, at \*3 (C.D. Cal.  
 25 March 16, 2015) ("A prisoner's weak educational background or lack of literacy is not enough to  
 26 establish an extraordinary circumstance"); Jimenez v. Hartley, 2010 WL 5598521, at \*5 (C.D.  
 27 Cal. Dec. 6, 2010) (allegations that petitioner was uneducated, illiterate, and indigent insufficient  
 28 to warrant equitable tolling), adopted 2011 WL 164536 (C.D. Cal. Jan. 13, 2011); cf. Hughes v.

1       *Idaho State Bd. Of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (illiteracy and pro se status  
 2 insufficient cause to avoid procedural default). As argued by respondent, the record reflects  
 3 petitioner's ability to write letters both to the court and to his appellate counsel, as well as  
 4 multiple CDCR 22 forms. In light of such evidence, as well as the cited authorities, petitioner  
 5 fails to demonstrate how his low reading score prevented him from earlier filing his petition.

6           Petitioner also argues he is entitled to equitable tolling because he "did not know about the  
 7 deadline until appellate counsel advised him of the deadline after the deadline had passed," (ECF  
 8 No. 1 at 20), apparently referring to counsel's January 15, 2013 letter. Such argument fails to  
 9 acknowledge counsel's August 22, 2012 letter advising petitioner that any federal petition must  
 10 be filed within one year and 90 days from the ruling on the petition for review (ECF No. 1 at 42),  
 11 as well as his own declaration attesting to such knowledge (ECF No. 1 at 33 ¶ 13). But in any  
 12 event, it is well established that a prisoner's ignorance or confusion about the law is not an  
 13 extraordinary circumstance and does not equitably toll the limitations period. See Ford v. Pliler,  
 14 590 F.3d 782, 789 (9th Cir. 2009) (the petitioner's confusion or ignorance of the law does not  
 15 satisfy the extraordinary circumstance standard), cert. denied, 562 U.S. 843 (2010); Rasberry v.  
 16 Garcia, 448 F.3d 1150, 1154 (9th Cir. 2006) ("A pro se petitioner's lack of legal sophistication is  
 17 not, by itself, an extraordinary circumstance warranting equitable tolling.").

18           5. *COVID-19 Restrictions*

19           Finally, petitioner's reliance on COVID-19 restrictions is unavailing because COVID-19  
 20 was not identified or confirmed until early 2020, long after the limitations period expired. The  
 21 California Department of Public Health first announced two confirmed cases of the novel  
 22 coronavirus in California on January 26, 2020.<sup>6</sup> <sup>7</sup> On March 19, 2020, as a result of the threat of

---

23       <sup>6</sup> <<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-001.aspx>> accessed October 8, 2021.

24  
 25       <sup>7</sup> The court may judicially notice a fact not subject to reasonable dispute because it "(1) is  
 generally known within the trial court's territorial jurisdiction; or (2) can be accurately and  
 readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid.  
 201(b). Judicial notice is proper for public records whose accuracy is not in dispute. See  
Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012) ("[A court] may take judicial notice  
 of records and reports of administrative bodies." (internal quotation marks omitted)); United  
States v. Ritchie, 342 F.3d 903, 909 (9th Cir. 2003) (same).

1 COVID-19, Governor Newsom issued an executive order ordering all individuals living in the  
2 State of California to stay home or at their place of residence.<sup>8</sup> Because the statute of limitations  
3 expired on January 15, 2014, any restrictions imposed on petitioner as a result of COVID-19  
4 could not have impacted his timely filing.

5       G. Conclusion

6           The limitations period expired on January 15, 2014, yet petitioner failed to file the instant  
7 petition until November 5, 2020, and failed to demonstrate that he was diligent throughout the  
8 limitations period. Davis, 953 F.3d at 582. Respondent's motion to dismiss should be granted,  
9 and petitioner's motion for an evidentiary hearing be denied.

10      IV. Recommendations

11           Accordingly, IT IS HEREBY RECOMMENDED that:

- 12           1. Petitioner's motion for an evidentiary hearing (ECF Nos. 1, 19) be denied;  
13           2. Respondent's motion to dismiss (ECF No. 9) be granted; and  
14           3. This action be dismissed with prejudice.

15           These findings and recommendations are submitted to the United States District Judge  
16 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **thirty** days after  
17 being served with these findings and recommendations, any party may file written objections with  
18 the court and serve a copy on all parties. Such a document should be captioned "Objections to  
19 Magistrate Judge's Findings and Recommendations." In his objections petitioner may address  
20 whether a certificate of appealability should issue in the event he files an appeal of the judgment  
21 in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district court must  
22 issue or deny a certificate of appealability when it enters a final order adverse to the applicant).  
23 Where, as here, a habeas petition is dismissed on procedural grounds, a certificate of appealability  
24 "should issue . . . if the prisoner shows, at least, [1] that jurists of reason would find it debatable  
25 whether the petition states a valid claim for the denial of a constitutional right, and [2] that jurists

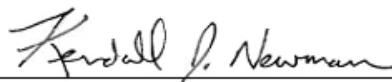
---

27           28           <sup>8</sup> Cal. Exec. Order N-33-20 (Mar. 19, 2020), <<https://www.gov.ca.gov/2020/03/19/governor-gavin-newsom-issues-stay-at-home-order/>>, accessed October 13, 2021.

1 of reason would find it debatable whether the district court was correct in its procedural ruling.”  
2 Petrocelli v. Angelone, 248 F.3d 877, 883-84 (9th Cir. 2001) (quoting Slack v. McDaniel, 529  
3 U.S. 473, 478 (2000)). Any response to the objections shall be served and filed within fourteen  
4 days after service of the objections. The parties are advised that failure to file objections within  
5 the specified time may waive the right to appeal the District Court’s order. Martinez v. Ylst, 951  
6 F.2d 1153 (9th Cir. 1991).

7 Dated: October 22, 2021

8  
9 /meza2316.mtd.hc.sol

  
KENDALL J. NEWMAN  
UNITED STATES MAGISTRATE JUDGE

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28